IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Margaret Bollinger and Charles Bollinger, petitioners, pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on May 6, 1946 (R. 248) reversing a judgment of the United States District Court for the Southern District of New York. Petition for rehearing was denied by the Circuit Court on May 25, 1946 (R. 258).

Opinions Below

No opinion was rendered by the United States District Court for the Southern District of New York. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 244) is reported in 155 F. (2d) 326.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 6, 1946 (R. 248). Petition for rehearing was denied May 25, 1946 (R. 258).

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under the provisions of Article III, Section II of the Constitution of the United States.

Jurisdiction of the United States District Court for the Southern District of New York rested on diverse citizenship.

Questions Presented

1. Whether the Circuit Court of Appeals followed an unconstitutional course in failing to follow the New York State Law on the existence of a jury question, and violated the Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. S-725, 28 U. S. C. A. S-725, which provides:

> "The laws of the several States except where the Constitution treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

2. Whether the Circuit Court of Appeals violated the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutes Involved

1. Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. S-725, 28 U. S. C. A. S-725.

2. Seventh Amendment of the United States Constitution.

Statement

Margaret Bollinger, petitioner herein, and plaintiff-appellee in the Court below, sued the defendant-respondent, Gotham Garage Company, to recover damages for personal injuries sustained by falling into an unguarded elevator shaft on the ground floor of the garage. Her husband, Charles W. Bollinger, sued for loss of consortium, and for medical expenses incurred on account of her injuries.

Federal jurisdiction rests on diverse citizenship.

A "forthwith" and also a subsequent judgment in the sum of $18,949.05 were entered in the Clerk's Office of the United States District Court, Southern District of New York, on the 12th and 18th days of December, 1945.

The defendant appealed from the judgments to the Circuit Court of Appeals, for the Second Circuit. The Circuit Court reversed the judgments with directions to dismiss the complaint.

On October 31, 1943, plaintiff Margaret Bollinger came upon the premises of the defendant Gotham Garage Company (R. 17, 19, 26, 30, 31, 63, 100, 126) with a customer of the garage (R. 13, 17, 118) named Eugene C. Pierce.

Pierce herded the women in his party, including Mrs. Bollinger, ahead of him into the garage (R. 17, 145). He handed the attendant the ticket, at which time Mrs. Bol-

linger was a step in back of him in the garage (R. 19, 25, 26, 30, 31, 100, 126, 145, 210). The physical layout of the garage is shown in Plaintiffs' Exhibit 1 (R. 223) and Defendant's Exhibits A and B (R. 224, 226). She was permitted to enter the garage (R. 17, 19, 25, 30, 31, 63, 100, 126, 145, 210) and no objection was made to her presence therein.

Mr. Bollinger, who had remained behind to pay the chauffeur of the taxicab which had brought them to the garage, entered the premises just as the attendant was leaving Mr. Pierce.

Mr. Bollinger asked Pierce where the rest rooms were. Pierce replied that he thought they were in the rear and suggested following the attendant (R. 26, 31, 53, 71, 100). Mr. Bollinger, who wasn't any great distance back of the attendant (R. 53, 145), saw the latter walking to the rear of the garage (R. 101). There were no signs forbidding patrons or others to enter into this area (R. 79).

About this time Mrs. Bollinger called to and halted her husband, to go with him (R. 71, 101, 126, 145).

While Mrs. Bollinger was joining her husband, the attendant had gone to the elevator, which he testified was about 10 or 15 feet from the office (R. 119). Plaintiffs' Exhibit 1 (R. 223)—Defendant's Exhibits A and B (R. 224, 226). The attendant took the lift upstairs to get the car (R. 119). He took the chain off the elevator shaft and left it off (R. 118), leaving an exposed and unprotected pit.

After Mrs. Bollinger reached her husband, they proceeded on, into the area where the attendant had gone (R. 101). Mr. Bollinger stopped as he got beyond the first wall where the sink was located, expecting to find a door immediately beyond that particular spot which would probably be the toilet (R. 106, 108). He saw instead what he took to be the exit to the garage, the same as the entrance to the garage (R. 107). What later turned out to be the pit was

not distinguishable from the floor of the garage, but was black on black (R. 107, 108, 110, 111, 159, 161, 163, 185). Even Pierce did not distinguish it as an elevator shaft at first (R. 32, 35, 42). Mrs. Moore said it was pitch black in the shaft (R. 65, 67).

Mr. Bollinger did not know he was next to a pit (R. 108), and Mrs. Bollinger turned and stepped off into the shaft (R. 73, 112, 114, 128, 160).

There was no chain across the shaft (R. 73), and no signs or warning (R. 78, 79). The chain had been taken off and left off by George Poccia (R. 118, 119), the employee of the garage who was on duty that evening (R. 117).

Defendant's motions to dismiss, at the end of the plaintiffs' case, were denied (R. 200).

The defendant offered the dimout regulations in evidence, asked the Court to take judicial notice of them, and rested (R. 201).

Defendant renewed its motions to dismiss (R. 202). No motion for a directed verdict was made.

Judge LEIBELL, presiding at the trial, in the United States District Court for the Southern District of New York, then charged the jury following the language in the case of *Walsh* v. *Fitchburg R. R. Co.*, 145 N. Y. 301, 306. He differentiated between the duty owing by the owner of premises to an invitee and the duty owing to licensee (R. 211). He instructed the jury, as a matter of law, that plaintiffs-petitioners were licensees at the time of injury (R. 212). [Exception was taken to this portion of the charge by plaintiffs-petitioners (R. 220).] Having defined plaintiffs' status and the duty owing, he submitted the issue of active negligence to the jury (R. 212), as well as the issue of contributory negligence (R. 215). The jury awarded Mrs. Bollinger $15,000.00, and Mr. Bollinger $3,800.00 (R. 221). Defendant's motion to set aside the verdict was denied (R. 221).

The Circuit Court of Appeals after stating that the jury was not entitled to find that plaintiffs' were in the area of the business invitation, held that plaintiffs were licensees and directed a dismissal of the complaint (R. 247).

The sense of the opinion is somewhat obscure, for the jury were not permitted by the District Court to determine the issue of plaintiffs' status. They were instructed, at the trial [over exception (R. 220)], that plaintiffs were licensees (R. 212), and the only issue (besides contributory negligence), submitted to them for determination was whether there was active negligence or a breach of the duty owing to a licensee (R. 212). The Circuit Court's opinion is silent on the question of active negligence, and if it meant that despite active negligence the accident was not foreseeable, it constitutes a factual re-evaluation of the jury's determination to the contrary.

Specification of Errors to Be Urged

Margaret Bollinger and Charles Bollinger, petitioners here, and plaintiffs-appellees in the Court below, urge that the Circuit Court of Appeals erred:

1. In failing to respect authoritatively declared New York State law holding that a property owner is liable to a licensee for active or affirmative negligence, and is also liable where he permits a trap or pitfall to exist on his property.

2. In failing to follow the distinction observed in the New York cases between active and passive negligence.

3. In failing to follow the New York cases which express the rule that causation and foreseeability are factual matters for a jury to determine.

4. In failing to observe the New York rule that a jury's verdict on an issue, such as active negligence, upon which varying inferences could properly be drawn may not be re-examined and set aside.

5. In failing to observe the New York rule to the effect that the scope of a property owner's invitation insofar as it may affect the status of an invitee or licensee is a question of fact. (Petitioner claims that the District Court also erred in this connection.)

6. In failing to respect the Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. A. S-725.

7. In failing to respect the Seventh Amendment to the Constitution of the United States.

8. In reversing the judgment of the United States District Court for the Southern District of New York and directing a dismissal of the complaint.

Reasons for Granting the Writ

There are now pending in New York State and Federal Courts hundreds of suits involving the status of persons on the premises of others, and the duty owing to them. In cases where the facts conformed to those in the case at bar it was assumed in New York until the decision in this case that the issue of status and the degree of negligence were jury questions. Thus there is a substantial question, not only to the plaintiffs who have been deprived of over $18,000 awarded them by a jury for the serious injuries suffered, but to the other litigants as well, as to whether the construction heretofore placed on the New York cases must be abandoned in light of the Circuit Court's opinion, or whether the latter is erroneous.

More important is the matter of the impact of state law on Federal jury trials insofar as it affects the direction of non-suit and taking a case from the jury. The petitioners feel that rights granted them by state law have been limited and lost to them as a result of the decision here. Petitioners believe that the force of state rules as to the discovery of a jury question is one of first impression which now should be resolved by this Court, so that the doctrine of the case of *Erie* v. *Tompkins* can be extended and carried to its logical conclusion. This Court can now eliminate the conflict between cases holding that state rules govern the discovery of a jury question* and those to the contrary.†

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Dated: July 30, 1946.

MARGARET BOLLINGER and
CHARLES BOLLINGER,
Petitioners,

By WILLIAM C. MORRIS,
Counsel for Petitioners.

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* *Morgan, Choice of Law Governing Proof* (1944), 58 Harv. L. Rev. 153, 175, cited in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 110 (1945). Professor Morgan cites for this *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464 (1940); *Laxton* v. *Hatzel & Buehler, Inc.*, 142 F. (2d) 913 (C. C. A. 6th, 1944); *Waldron* v. *Aetna Casualty & Surety Co.*, 141 F. (2d) 230 (C. C. A. 3rd, 1944). See also *3 Moore, Federal Practice* (Supp. 1945) 3-23.

† *Gorham* v. *Mutual Ben. Health & Accident Ass'n of Omaha*, 114 F. (2d) 97, 99 (C. C. A. 4th, 1940), cert. denied 312 U. S. 688 (1941); *McSweeney* v. *Prudential Ins. Co. of America*, 128 F. (2d) 660 (C. C. A. 4th, 1942), cert. denied 317 U. S. 658 (1942); *Zauderer* v. *Continental Cas. Co.*, 140 F. (2d) 211 (C. C. A. 2nd, 1944); *Barr* v. *Equitable Life Assur. Soc. of United States*, 149 F. (2d) 634 (C. C. A. 9th, 1945); *cf. Grobelny* v. *W. T. Cowan, Inc.*, C. C. A. 2nd, Nov. 27, 1945. This of course was the former view. *Herron* v. *Southern Pac. Co.*, 283 U. S. 91 (1931). But *cf. Goodall Co.* v. *Sartin*, 141 F. (2d) 427 (C. C. A. 6th, 1944), cert. denied 65 Sup. Ct. 34 (U. S. 1944).

BRIEF IN SUPPORT OF PETITION

I

The Circuit Court acted improvidently in nullifying a jury's determination that the defendant was guilty of active negligence in breach of the duty owed to a licensee, and that the occurrence was reasonably foreseeable.

The issue presented to the jury was not whether plaintiffs-petitioners were licensees, but whether as licensees, a duty owing them in that capacity had been breached.

The Circuit Court's opinion that because plaintiffs-petitioners were licensees they can not recover, is a *non sequitur*, when the issue of active negligence is left without discussion.

The Circuit Court stated in its opinion:

> "Upon the record before us no jury could find that the appellant had given a car owner or his friends reason to believe that they were permitted to leave the office and search about in the dark or dimly lighted ground floor for toilet facilities."

Petitioners submit that this statement is erroneous for several reasons.

Petitioners were not in the office. They were outside the office in the garage proper. They were following the attendant at the suggestion of Pierce, the garage customer (R. 19, 26, 31, 71, 74).

Secondly, in view of the District Court's charge on the question of darkness (R. 215, fol. 644), it must be presumed that the jury eliminated this element, and found a trap or pitfall from the deceptive character of the open shaft as

contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185). In other words, the jury found that it was light enough to see the upper surroundings but that the open pit and garage floor were not distinguishable one from the other, and that as a result of this deception or trap, and the active negligence of the garage employee in taking off the chain, that appellees were injured.

Thirdly, the question of appellees' status and whether they were permitted to or had gone outside the area of the invitation was not decided, as the Circuit Court says, by the jury at all. The Circuit Court has apparently misread the record. The Trial Court instructed the jury as to the status of the appellees, stating they were licensees (R. 211, 212). In this respect the Trial Court and Circuit Court are in accord.

Having been informed as to appellees' status, the jury were then instructed on the duty owing by the defendant-appellant to persons in that status (R. 211, 212).

The Trial Court then stated the issue (R. 212):

> "If the operator of the business fails in his duty toward the invitee or licensee, if he fails to exercise the care required by law, as I have explained it to you, then his conduct falls below the standard established by law for the protection of others against unreasonable risk of harm, and such conduct would constitute negligence."

The jury then reached its verdict for which the Circuit Court has substituted its own.

If the Trial Court erred in its charge as to the duty owing to a licensee, a new trial should be granted and not a dismissal, for the injuries to appellees are serious.

Moreover, it is significant that the Circuit Court missed the real issue involved, for the two cases cited in its opinion, *Sanders* v. *Favorable Realty Corp.*, 290 N. Y. 591;

Hudson v. *Church of Holy Trinity*, 250 N. Y. 513, did not involve active negligence but dealt with an action by a licensee for injuries resulting from the condition of the premises, or an omission on the part of the licensor or his employees. Such a situation is entirely foreign to the case at bar for the defendant here has been held liable by the jury for active negligence and not by reason of a mere defect on the premises.

Grassman v. *Fromm*, 292 N. Y. 699;
Haverstick v. *Hansen & Sons, Inc.*, 277 N. Y. 158, 161, 162;
Hyde v. *Maison Hortense Inc.*, 252 N. Y. 534.

The distinction between active and passive negligence is recognized in New York.

Byrne v. *New York C. and H. R. R. Co.*, 104 N. Y. 362, 366;
Grassman v. *Fromm* (*supra*);
Haverstick v. *Hansen & Sons, Inc.* (*supra*);
Restatement, 2 Torts, S. 341.

The failure to observe this distinction by the Circuit Court (for it will be observed that the opinion is silent on this), has resulted in a nonsuit to plaintiff, Mrs. Bollinger, whose injuries were most severe (R. 206), and never questioned on appeal (R. 87, 198).

The jury had ample evidence before it to justify its finding of active wrongdoing.

There was the fact that the garage employee took the chain off and left it off (R. 118-119). No effort greater than the risk was required to fasten the chain across the shaft and prevent the accident.

Hyde v. *Maison Hortense Inc.* (*supra*);
Meisle v. *N. Y. C. & H. R. R. Company*, 219 N. Y. 317, 321;

Plunkett v. *Dick*, 287 N. Y. 810, 811;
Van Zandt, et al. v. *Berger Co.*, 79 Fed. (2d) 506, 507;
Crawford v. *Wilson & B. Mfg. Co.*, 144 N. Y. 708;
Lande v. *L. & S. Const. Co. Inc.*, 191 App. Div. 497;
Cf. Lyon v. *Queensboro Corp.*, 232 App. Div. 781;
Hente v. *Schercoop Mfg. Co.*, 289 N. Y. 140;
Mensch v. *121 Canal St. Co., Inc.*, 263 N. Y. 557;
Stewart v. *Hall Cold Storage Co.*, 263 N. Y. 620.

Leaving the chain off created a trap.

Haverstick v. *Hansen & Sons, Inc.*, 258 N. Y. 158, 161.

Taking and leaving the chain off was a breach of the duty to abstain from injuring plaintiff "intentionally" (R. 212), for intent may be found in the recklessness of defendant's conduct.

Magar v. *Hornell*, 183 N. Y. 387, 390;
Gross v. *Goodman*, 173 Misc. 1063;
Beck v. *Libraro*, 220 App. Div. 547, 548.

No signs, warning or other information were posted indicating that entrance into the area was forbidden or that danger existed. This justified a conclusion that the business of the garage was conducted in an affirmatively negligent manner (R. 7). "* * * he must be warned of peril, if it is sought to restrict his movements where otherwise he would be likely to go." *McNally* v. *Oakwood*, 210 App. Div. 613, 615, affd. 240 N. Y. 600.

Cf. Kittle v. *State of New York*, 241 App. Div. 401, 402, affd. 272 N. Y. 420;
Jenkins v. *313-321 West 37th Street Corporation*, 284 N. Y. 397, 402;
Meiers v. *Koch Brewery*, 229 N. Y. 10;
Ferro v. *Sinsheimer Estates*, 256 N. Y. 398;

Restatement, 2 Torts, 342;
Winfield, Law of Torts (2d Ed.), p. 622;
Harper Torts, p. 222.

Failure to have a warning sign or to have the passage barred would be negligence at common law.

Camp v. *Wood*, 76 N. Y. 92.

Plaintiffs were permitted to enter the garage (R. 17, 19, 25, 26, 30, 31, 63, 100, 126, 145, 210), and no restriction was placed on their movements. The failure to employ a watchman or suitable person to warn them not to go further (R. 7) would be a further indication that the business was conducted in an affirmatively negligent manner.

Cf. Schubart v. *Hotel Astor, Inc.*, 168 Misc. 431, 435; affd. 281 N. Y. 597.

Moreover, in view of the Court's charge on the question of darkness (R. 215), it must be presumed that the jury eliminated this element, and found a trap or pitfall from the deceptive character of the open shaft as contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185).

McRickard v. *Flint*, 114 N. Y. 222, 229;
Restatement, Torts, Sec. 336, comment c, and special note following comment e;
Cf. Vaughn v. *Transit Development Co.*, 222 N. Y. 79, 84.

Elevator shafts are regarded as dangerous instrumentalities, especially if located in dark places or in such close proximity to doors that a person entering the door may step into them unawares.

Atkinson v. *Abramson*, 45 Hun 238.

There being sufficient evidence to justify a finding of active negligence and a trap or pitfall, the Circuit Court was not entitled to set the verdict aside and dismiss the complaint.

The questions of the sufficiency of the evidence and the discovery and re-examination of a jury question are matters of local law which Federal Courts in diversity of citizenship cases must apply.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817;
Cities Serv. Oil Co. v. *Dunlap*, 308 U. S. 208, 84 L. ed. 196, 60 S. Ct. 201;
Guaranty Trust Co. v. *York*, 326 U. S. 99, 110;
Clark, State Law in the Federal Courts, Yale Law Journal, Vol. 55, Feb. 1946, pp. 289, 290.

Certainly the Circuit Court was not entitled to dismiss the complaint because it felt that the garage employee's act in taking off and leaving off the chain was not active negligence, or that the absence of guards or warning was not affirmative negligence in the conduct of a business, or that the deceptive character of the shaft created a trap or pitfall. It was not entitled to substitute its viewpoint in place of the jury's.

Hyde v. *Maison Hortense* (*supra*);
Christensen v. *Hannon*, 230 N. Y. 205, 208;
Elias v. *Lehigh Valley R. R. Co.*, 228 N. Y. 154;
Grassman v. *Fromm* (*supra*);
Christianson v. *Breen*, 288 N. Y. 435, 438;
Condran v. *Park & Tilford*, 213 N. Y. 341;
Munsey v. *Webb*, 231 U. S. 150;
Sackheim v. *Pigueron*, 215 N. Y. 62, 68;
McRickard v. *Flint* (*supra*);
Stump v. *Burns*, 219 N. Y. 306.

If the Circuit Court meant that the accident could not have been foreseen in that portion of the premises, and for that reason, regardless of active negligence or trap or pitfall, plaintiffs could not recover, it was substituting its judgment for that of the jury's to the contrary.

Under New York law it was not entitled to do this.

Where a general verdict is rendered it is presumed that all material issues of fact raised by the pleadings were determined in favor of the prevailing party.

> *Barker* v. *Cunard S.S. Co.*, 91 Hun 495, affd. 157 N. Y. 693.

The Court must "give to the plaintiff the benefit of any cause of action established by the evidence."

> *Bailey* v. *Hornthal*, 154 N. Y. 648, 654.

It was error for the Circuit Court to decide as a matter of law that the accident was not foreseeable after the jury had determined under a proper charge (R. 216, 218) that it was.

In New York the rule is aptly stated by the late Mr. Justice CARDOZO, in the case of *Condran* v. *Park & Tilford*, 213 N. Y. 341, 346, where plaintiff's intestate died in an elevator accident:

> "Whether it ought to have been foreseen, whether, if seen, it portended danger, and whether, if danger resulted, the fall of the elevator was a proximate consequence, were questions for the jury. (Munsey v. Webb, supra.)"

In New York State, causation and foreseeability are jury questions.

In *Dandino* v. *N. Y. Central R. R. Co.*, 273 N. Y. 111, 113, 114, Judge LOUGHRAN, writing for the Court of Appeals, remarked:

"The decisive issue was neatly stated by that court in this manner: 'Was the accident, not just exactly as it happened but, as it might have happened, reasonably foreseeable by defendant's servants acting with due regard for the plaintiffs' rights?' Unless we are prepared to say that all reasonable minds would give a negative answer on all the facts of the plaintiffs' case, then there was evidence of the defendant's negligence proper to go to the jury and the dismissal of the complaint cannot be upheld."

* * * * * * *

"On these facts (which the jury must be taken to have found) it has been held that there was no evidence of negligence of the defendant.

* * * * * * *

"We find ourselves unable to say that it was not open to any reasonable mind to come to a contrary conclusion on the whole case for the plaintiff. * * * The question here is whether the jury were perverse or fanciful in the view they took of the occurrence. (Hart v. Hudson River Bridge Co., 80 N. Y. 622.) Looking at the case in that way we think it was properly handled at the trial.

"The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed."

In *Haverstick* v. *Hansen & Sons, Inc.*, 277 N. Y. 158, 161, 162, where plaintiff fell through a grating on which the hinge had been broken by the defendant, the Court of Appeals stated:

"In this condition the grating became a dangerous trap to anyone who might happen to step upon it, as it would be likely to give way and land the person in the cellar. This is what did happen. * * *

"This is a case of active negligence and it makes no difference where the danger was created provided the person doing the act had reason to foresee that it might or would probably cause harm to others. A stranger who injures real property or lays a trap

> in it whereby others are hurt, is liable for his acts provided a reasonably prudent person would have realized the danger. This is a case where the direct act of negligence caused an injury which any reasonably prudent man should have foreseen, at least the evidence created a question of fact for the jury."

There is no distinction between that case and the one at bar, for here the defendant took off the chain from the shaft and left it off, creating a trap (R. 118, 119).

The case of *Grassman* v. *Fromm*, 292 N. Y. 699, further illustrates the New York law. Plaintiff fell into a freight elevator shaft in a building to which he had returned after working hours to recover his pocketbook. The Appellate Division, 266 App. Div. 745, reversed a judgment in his favor, stating:

> "There is no evidence of a breach of duty owed by the defendant to the plaintiff. A stairway was in existence which, concededly, was for the use of the employees. To the knowledge of the plaintiff passenger riding on the elevator was forbidden by the defendant and by the law."

The Court of Appeals reached a contrary conclusion, stating (p. 700):

> "There was evidence from which the jury could have found that the plaintiff was a licensee to whom the defendant owed the duty to refrain from an act of affirmative negligence. In those circumstances the question of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury."

In *Stump* v. *Burns*, 219 N. Y. 306, plaintiff's intestate was killed when he walked into an open elevator shaft. The New York Court of Appeals remarked at page 309:

> "The open door leading into the elevator permitted the intestate, without hindrance, to enter the elevator, and was an indication that the elevator

was there present and could be entered. The janitor standing within it did not operate as a bar or obstruction to a person desiring to enter. The defendant through his servant, the janitor, knew that the door was open and that intestate could pass between the janitor and the right side of the door. He knew to what extent, if any, the open door would induce and the position of the janitor would, within reasonable anticipation or prescience, warn or interfere with a person intending to enter the elevator. The evidence does not disclose any ground for a belief on the part of the janitor that nobody would desire to take the elevator during the time he maintained his position. The janitor knew the existing conditions as to the degree of light within the hall and as to the exact location of the elevator and of the boy who operated it. The knowledge we have spoken of is not inconsistent or irreconcilable with a natural apprehension on the part of the janitor that somebody might pass through the door into the shaft, and it was for the jury to determine under a proper submission of all the evidence with proper instructions whether or not the janitor, with reasonable thoughtfulness in regard to the safety of a person who intended to take the elevator, should have apprehended that a person might in the exercise of due care pass through the door."

(At p. 311) "The facts that the janitor and his position and attitude were obvious to the intestate, and that the boy who ran the elevator was not visible in the hall had their importance but the former was not inconsistent with the presence of the elevator at the level of the floor of the hall. Whether or not a person, situated as was the intestate, using attention and care ordinary under the circumstances and conditions would have seen the floor of the elevator five feet and nine inches above that of the hall, reasonably permits opposing answers and cannot be determined as a matter of law. The verdict of a jury, based upon a consideration of all the evidence, facts and inferences, can alone establish the negligence or freedom from negligence of the intestate."

The statement by the Circuit Court that plaintiffs were bound to ask the attendant for information, imposes a greater duty on the plaintiffs than the law requires. This is the same as saying that an owner with a nuisance on his premises casting noisome smells into plaintiff's house, may escape liability because the plaintiff could have shut them out by closing doors and windows. It imposes a duty on a party having no knowledge of the peril and relieves the party who created the condition, knew of it, and could have warned of or corrected it. Moreover, whether plaintiffs should have asked the attendant was a question for the jury to consider in determining whether plaintiffs had exercised the care required of them.

Stump v. *Burns* (*supra*).

The one who does or should know whether entrance into a place can be safely made has the duty of limiting the invitation rather than the person entering.

Christensen v. *Hannon*, 230 N. Y. 205, 208.

In *Sackheim* v. *Pigueron*, 215 N. Y. 62, 68, where plaintiff's intestate was killed from falling down an elevator shaft, the Court of Appeals in New York stated:

> "The door being opened practically the whole width of the same, was in some degree at least an invitation for her to enter through the same. Under all the circumstances of this case, we cannot say that the inferences to be drawn from them are certain and uncontrovertible, and that different minds might not reach diverse conclusions. We do not agree that the deceased, as a matter of law, might not have a right to rely upon the conditions and surroundings as the same appeared to her. The questions of negligence were peculiarly for the jury to pass upon and the ruling of the trial justice that as matter of law 'the deceased walked into an open elevator shaft in daylight and, therefore, was guilty of contributory negligence' was error. The statement

of such a general rule excludes a consideration of the circumstances attending the accident, irrespective of the facts surrounding the same."

The right to have the factual matters determined by the jury is a constitutional right of great value.

New York State has established a standard of liability based on economic and social conditions. It has extended liability to large organized undertakings of all kinds where the loss is distributable by insurance, or charged to operating cost. Its application has been felt in special relationships of all kinds, where the enterprise is large and deals with the public.

Ehret v. *Village of Scarsdale*, 269 N. Y. 198 (gas co.); *Gleason* v. *Hillcrest Golf Course*, 148 Misc. 246; *Lamm* v. *City of Buffalo*, 225 App. Div. 599 (sporting enterprise); *Daniels* v. *Firm Amusement Corp.*, 158 Misc. 251; *Hart* v. *Hercules Thea. Corp.*, 258 App. Div. 537; *Tapley* v. *Ross Theatre Corp.*, 275 N. Y. 144 (theatres); *Bresler* v. *N. Y. R. T.*, 277 N. Y. 200; *Crawford* v. *B. & O. Transit*, 254 App. Div. 582 (transportation facilities); *Rapee* v. *Beacon Hotel Corp.*, 293 N. Y. 196; *Schubart* v. *Hotel Astor*, 281 N. Y. 597 (hotels); *Plunkett* v. *Dick*, 287 N. Y. 810; *Stanley* v. *Woolworth*, 153 Misc. 665 (stores); *Aaron* v. *Ward*, 203 N. Y. 351 (bath house keeper); *Schloendorff* v. *N. Y. Hosp.*, 211 N. Y. 125 (hospital); *Warner* v. *Lucey*, 238 N. Y. 638 (garage).

Under the circumstances, a grievous error was committed here, where the defendant which created the condition and had the means to prevent injuries to others has been relieved of liability, while the plaintiffs, completely innocent, and seriously injured and damaged have been deprived of the recovery awarded by a jury.

The District Court thought that a question of fact was presented. Twelve members of the jury found the defendant negligent. There was evidence to justify this finding.

There was no authority in the Circuit Court to weigh the evidence to determine whether they and not the jury thought it sufficient.

II

It was error for the District Court and Circuit Court to hold as a matter of law that plaintiffs-petitioners were licensees rather than invitees, and require them as such to establish the active negligence of the defendant, rather than the defendant's failure to exercise reasonable care.

The District Court, over exception (R. 220), and the Circuit Court held that when she passed beyond the area of the invitation she became a licensee. The Circuit Court said that no jury were entitled to find that she was within the area of the business invitation, and that she should have asked the attendant before proceeding. [Aside from the fact that the jury did not decide this issue the statement also overlooks the fact that plaintiff followed the attendant but he disappeared (R. 101).]

The companion of a garage patron is an invitee in New York.

Warner v. *Lucey*, 207 App. Div. 241, affd. 238 N. Y. 638;
Meyer v. *Manzer*, 179 Misc. 355, 39 N. Y. Supp. (2d) 5;
Cf. Hamblet v. *Buffalo Library Garage Co.*, 222 App. Div. 335;
Crimi v. *R. H. Macy & Co., Inc.*, 294 N. Y. 753.

The invitation was in no way limited. The duty was not on plaintiffs but on the garage keeper to limit the invitation and give warnings of any peril.

Stump v. *Burns*, 219 N. Y. 306;
Collentine v. *City of New York*, 279 N. Y. 119, 124;
McNally v. *Oakwood*, 210 App. Div. 612, affd. 240 N. Y. 600;
Adress v. *Mormando*, 243 A. D. 451, affd. 268 N. Y. 587;
Jenkins v. *313-21 W. 37th St. Corp.*, 284 N. Y. 397;
Meiers v. *Koch*, 229 N. Y. 10;
Christianson v. *Breen*, 230 N. Y. 205;
Elias v. *Lehigh Valley R. R. Co.*, 226 N. Y. 154.

In *McNally* v. *Oakwood* (*supra*), the Appellate Division remarked (pp. 614, 615):

> "It then becomes a question of fact as to whether one going to make a small purchase into such establishment is an invitee upon different parts of the premises which are not ordinarily used in serving the persons making such purchases at retail. * * * he must be warned of peril, if it is sought to restrict his movements where otherwise he would be likely to go."

Not only is the Circuit Court in error in assuming that the jury decided the status of the Bollingers, but it is also in error in stating that they had no right to find that they were within the area of the original invitation when injured.

In New York State this is a question of fact.

Restatement of the Law of Torts, Sec. 343, comment (b), remarks:

> "* * * There are many facilities which are offered to customers or patrons such as the rest rooms of a theatre, shop, or filling station which are as much a part of the business premises as the auditorium, shop or station itself. * * *
>
> "Since the status of the other as a business visitor depends on whether the possessor should have

known that his visitor would be led to believe that a part of the premises are held open to him as a business visitor, the question is often one of fact and as such a matter for the jury subject to the normal control which the court exercises over the jury's functions in such matters."

In *Grassman* v. *Fromm*, 292 N. Y. 690, the Court of Appeals of New York stated:

> "There was evidence from which the jury could have found that the plaintiff was a licensee to whom the defendant owed the duty to refrain from an act of affirmative negligence. In these circumstances the questions of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury."

In the case at bar there were no signs, warning or other information indicating that the invitation was in any way limited.

As was said in *Collentine* v. *City of New York*, 279 N. Y. 119, 125, at page 124:

> "Neither the injured boy nor those children could be deemed trespassers or mere licensees as matter of law."

And at page 126:

> "The record does not disclose a case where a direction of verdict was proper."

It was error for the Courts below to hold as a matter of law that plaintiffs' status changed from invitees to licensees. This question should have gone to the jury. It was unjust to plaintiffs to impose a burden upon them from which they should have been left wholly free.

III

The Circuit Court followed an unconstitutional course in re-examining the evidence, setting aside the jury's verdict and dismissing the complaint.

Seventh Amendment, United States Constitution.

The defendant at no time moved for a directed verdict. It has been held that where a losing party moved for a new trial after a verdict for the adverse party, but did not move for judgment, neither the Trial Court nor the Appellate Court had power to direct judgment for movant in view of the Seventh Amendment.

Aetna Inc. Co. v. *Kennedy ex rel. Bogaish,* 301 U. S. 389, 81 L. ed. 1177, 57 S. Ct. R. 809.

In New York, a party failing to move for a directed verdict concedes there is a question of fact for the jury.

Hirsch v. *Schwartz & Cohn,* 256 N. Y. 7.

Where fair-minded men might reach a different conclusion on the question of defendant's negligence, the question should be left to the jury.

Bailey v. *Central Vermont R. Co. Inc.,* 319 U. S. 350, 353, 354, 87 L. ed. 1444, 63 S. Ct. 1062, 1064;
Tennant v. *Peoria & P. N. Ry. Co.,* 321 U. S. 29, 33, 64 S. Ct. 409, 412, 88 L. ed. 520;
Blair v. *Baltimore & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545, 89 L. ed. 446;
Richmond & D. R. R. v. *Powers,* 149 U. S. 43, 45, 13 S. Ct. 748, 749, 37 L. ed. 642;
Washington & Georgetown R. Co. v. *McDade,* 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. ed. 235;

Tiller v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 67; 323 U. S. 574.

The retrial by a new jury rather than a factual re-evaluation by a court is a constitutional right of genuine value.

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879;
Tompkins v. *Erie R. Co.*, 98 F. (2d) 49;
Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 615.

It is submitted that the Circuit Court has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of review.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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